



**Waibara v Kibeh & another (Civil Application 31 of 2020)  
[2020] KESC 5 (KLR) (Civ) (4 December 2020) (Ruling)**

*Clement Kungu Waibara v Annie Wanjiku Kibeh & another [2020] eKLR*

Neutral citation: [2020] KESC 5 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL**

**CIVIL APPLICATION 31 OF 2020**

**PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ**

**DECEMBER 4, 2020**

**BETWEEN**

**CLEMENT KUNGU WAIBARA ..... PETITIONER**

**AND**

**ANNIE WANJIKU KIBEH ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

*(Being an Application under Section 16(3) of the Supreme Court Act for leave to appeal the Ruling and Order of the Court of Appeal (D. K. Musinga S. Ole Kantai & M. K. Koome, JJA) staying execution of the decision of the High Court (W. Korir delivered on 7th October, 2020)*

**The Supreme Court has no jurisdiction to hear and determine appeals against the interlocutory decisions of the Court of Appeal.**

*The Supreme Court has no jurisdiction to hear and determine appeals against the interlocutory decisions of the Court of Appeal.*

Reported by Beryl Ikamari

***Jurisdiction*** - jurisdiction of the Supreme Court - appellate jurisdiction - whether the Supreme Court had jurisdiction to hear and determine an appeal arising from an interlocutory decision of the Court of Appeal.

**Brief facts**

The High Court in H. C. Petition No. 21 of 2020 declared a vacancy in the seat of Member of Parliament for Gatundu North Constituency. An application for a stay of execution of the High Court's decision made by the 1<sup>st</sup> respondent was granted on October 28, 2020. The applicant filed a notice of motion seeking leave to institute a Supreme Court appeal against the Court of Appeal decision. The 1<sup>st</sup> respondent, in response, filed



a notice of preliminary objection whose gist was that the Supreme Court lacked jurisdiction to entertain the application which arose out of an interlocutory decision of the Court of Appeal and that the court also lacked jurisdiction over decisions that arose from the exercise of discretion by the Court of Appeal under rule 5 (2) (b) of the Court of Appeal Rules, 2010.

### **Issues**

Whether the Supreme Court had jurisdiction to hear and determine an appeal arising from an interlocutory decision of the Court of Appeal.

### **Held**

1. Without a judgment of the Court of Appeal which would create finality to the contested issues and also point the party to the specific limb of article 163(4) of the Constitution on which to invoke the court's jurisdiction, the jurisdiction of the court could not be invoked properly.
2. The invitation to assume jurisdiction over the matter was misguided.

*Application struck out. Applicant to pay the attendant costs.*

### **Citations**

#### **Statutes**

None referred to

#### **Advocates**

None mentioned

## **RULING**

### **A. Introduction**

1. On 7th October 2020, Korir J, determined H. C. Petition No.21 of 2020 between the parties herein with the result that the seat of Member of Parliament for Gatundu North Constituency was declared vacant.
2. The 1st Respondent, Anne Wanjiku Kibeh thereafter filed Civil Application No.E314 of 2020 at the Court of Appeal seeking stay of execution of the above decision under Rule 5(2)(b) of the Court of Appeal Rules, 2020. The stay was granted on 28th October 2020.
3. On 4th November 2020, the Applicant, Clement Kungu Waibara, filed a Notice of Motion predicated on Section 16(3) of the Supreme Act seeking leave to institute an appeal before this Court.
4. While opposing the Motion, the 1st Respondent, on 26th November 2020 filed a Notice of Preliminary Objection seeking orders that the Motion be struck out on the grounds that:
  - 1) This Court lacks the jurisdiction to hear applications arising from interlocutory decisions of the Court of appeal; and
  - 2) This Court lacks jurisdiction, under Article 163(4)(b) of the Constitution, to hear appeals, and interlocutory applications therein (or in intended appeals) from exercises, by the Court of Appeal, of judicial discretion pursuant to Rule 5 (2)(b) of the Court of Appeal Rules, 2010.

### **B. Submissions by the Parties**

#### **i) The 1st and 2nd Respondent's submissions**

5. In submissions filed on 26th November 2020, the 1st Respondent has relied on our decisions in Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & 2 others Sup. Ct. Application No.4 of



2012; [2012] eKRL, Hassan Ali Joho & another v. Suleiman Said Shahbal & 2 others, Sup. Ct. Petition No.10 of 2013; [2013] eKLR, Hermanus Phillipus Steyn v. Giovanni Gnecci-Ruscione, Application No.4 of 2012 [2012] eKLR, Teachers Service Commission v. Kenya National Union of Teachers & 3 others [2015] eKLR, Daniel Kimani Njehia v. Francis Mwangi Kimani & another Sup. Ct. Civil Application No.13 of 2014, Basil Criticos v. Independent Electoral and Boundaries Commission & 2 others, Sup. Ct. Petition No.22 of 2014, among others, to argue that this Court has no jurisdiction to hear and determine any question arising from interlocutory applications at the Court of Appeal as there would be no final order to which our jurisdiction under any of the limbs in Article 163(4) could be invoked.

6. The 2nd Respondent, by its submissions filed on 23rd November 2020, has also raised the issue of lack of jurisdiction of this Court to entertain the present Motion along the same lines as the 1st Respondent.

## **ii) The Applicant's submissions**

7. We have seen no specific response to the Preliminary Objection but in submissions filed on 4th November 2020, the Applicant has stated that;

“Pursuant to Section 16(3) of the Supreme Court Act, the Supreme Court may grant leave to appeal against an order made by the Court of Appeal on an interlocutory application if satisfied that it is necessary, in the interests of justice, for the Supreme Court to hear and determine the proposed appeal before the proceedings concerned is concluded. Under Section 16(1), it shall be in the interests of justice for the Supreme Court to hear and determine a proposed appeal if inter-alia, the appeal involves a matter of general public importance”.

8. We shall take the above submission to be the Applicant's position on the issue before us.

## **C. Analysis and Determination**

9. In the Teachers Service Commission case we partly rendered ourselves thus:

“An application so tangential, cannot be predicated upon the terms of Article 163(4) (a) of the Constitution. Any square involvement of this Court in such a context would entail comments on the merits, being made prematurely on issues yet to be adjudged, at the Court of Appeal, .... Such an early involvement of this Court in our opinion would expose one of the parties to prejudice with the danger of leading to an unjust outcome.

In these circumstances, we find that this Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5(2) (b) of that Court's Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court”

[Emphasis added]

10. Further, in Basil Criticos, we posed the following question as regards appeals to this Court from Rulings on interlocutory applications before the Court of Appeal:

“In the absence of a Judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this Court be sitting on appeal over?”



11. We reiterate the above findings and in that regard, we note that the Judgment of the High Court which led to proceedings before the Court of Appeal,thence the impugned Ruling, arose from a constitutional Petition and therefore the above question is relevant in the present circumstances.
12. Without a Judgment of the Court of Appeal which would then create a finality to contested issues and then point parties to the specific limb in Article 163(4) to which our intervention would be required, we cannot see how our jurisdiction under that Article can be properly invoked.
13. In the circumstances, we decline the misguided invitation to assume jurisdiction and would instead find that the Notice of Motion dated 30th October 2020 is one fit for striking out.
14. As for costs, they follow the event and so the Applicant shall pay the costs thereof.

**D. Disposition**

- i) The Notice of Motion dated 30th October 2020 is hereby struck out.
  - ii) The Applicant shall pay the attendant costs.
15. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF DECEMBER, 2020**

.....

**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR,**

**SUPREME COURT OF KENYA**

